No. 14933

IN THE

United States

Court of Appeals

For the Ninth Circuit

G. A. PEHRSON,

Appellant,

vs.

C. B. LAUCH CONSTRUCTION CO., a Corporation,

Appellee.

Appeal from the United States District Court for the District of Idaho, Northern Divison.

OPENING BRIEF OF APPELLANT

FRANK FUNKHOUSER,
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Spokane, Washington

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JURISDICTION

Jurisdiction arises out of diversity of citizenship (28 U. S. Code 1322).

The appellant is a resident and citizen of the State of Washington, and the defendant is a corporation organized under the laws of the State of Idaho.

The amount of the controversy exceeds three thousand dollars, exclusive of interest and costs.

This appeal is taken from Final Judgment entered October 22, 1954 and from an Order Denying Plaintiff's Motion for a New Trial entered August 30, 1955.

ASSIGNMENTS OF ERROR

1. The Court erred in striking from the plaintiff's complaint the allegations relating to waste material and rubbish.

2. The Court erred in refusing to admit Plaintiff's Exhibit No. 11.

3. The Court erred in refusing to give Plaintiff's Requested Instructions Nos. 2, 3, 4, 5, 6, 7 and 8.

4. The Court erred in not permitting School Director Hirst to testify.

STATEMENT OF FACTS

The plaintiff alleges plaintiff is a resident of the State of Washington, that defendant is a corporation organized under the laws of the State of Idaho.

That the controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

That the plaintiff is an architect of many years' standing, residing in Spokane, Washington, and duly licensed to practice his profession in the State of Idaho.

That plaintiff came to Spokane to take charge of the construction of the Davenport Hotel and has remained in Spokane since engaged solely in architectural work. This is plaintiff's first lawsuit. (89)

He was a strong and robust man (81), 5 feet 8 inches tall, weighs 168 pounds, was 68 years old September 12, 1952 (27), married, one daughter, not fitted for any other work. (27)

That on March 31, 1952, School District No. 82, in Bonner County, Idaho, entered into a contract with defendant for the construction of a six-room one-story brick school building, with frame, plank roof with composition roofing for the Cocolalla school area, (29) Prior thereto, plaintiff was employed as an architect to prepare plans and specifications for said building and to supervise its construction. (30)

He was a business invitee. (55-218) September 12, 1952, plaintiff and a school board member, Mr. Hirst, (Hurst) were inspecting said building. The main building roof was about 90% completed—walls up, roof planking was on, interior partitions going in (31), window frames in but not the glass (51), concrete walk not in. (51) Said Hirst asked plaintiff to inspect the roof, as the roof was not being laid in accordance with the terms of the contract. The only means of getting to the roof was to climb a 16 foot frame ladder (32), rungs 12 inches apart, to a concrete ledge forming a roof over the entrance to said building (32), said ledge being 15-1/3 feet from the ground at the time of the accident and projects from said building about 3 feet; a 3 foot 8 inch parapet concrete wall extended above the concrete ledge. In order to get from the concrete ledge to the roof of the main building one had to crawl (166), climb, boost oneself (196) or jump (182-193) over said 3 foot 8 inch concrete parapet wall. The standards of said ladder reached about a foot above said concrete ledge and the top rung of said ladder was about even with said ledge. Said ladder was not fastened in any way to the ledge of main building. (52) All the workmen used said ladder. Said ladder was to the left of said ledge, leaning against the main building. Rubbish and broken concrete blocks lay about the base of the ladder. (84) Said 16′ ladder was too short. (109)

About 11:30 A. M. on said September 12, 1952, School Director Hirst proceeded up the ladder and on to the roof. When plaintiff started up the ladder its top was about 6 inches from and to the left of said concrete ladge (52), leaning against said main building. When he got to the top of the ladder he began to transfer his body from the ladder to the concrete ledge. Standing on the second rung from the top of the ladder, he took hold with his left hand the top of the parapet wall, he moved his right knee over on the concrete ledge, and in getting his balance from the ladder to the ledge, as he had done several times previously, the ladder began to move to the left, his finger tips began to slip from the concrete parapet wall and he fell to the ground (33), a distance of 15'4" (44), on top of broken concrete blocks. Said plaintiff suffered a fracture of the right femur, a fracture of the collar bone, two broken ribs, and other painful bruises and contusions and, as a result, plaintiff was confined to the hospital and his home until February 12, 1953, and has been under the doctor's care since. (81) It was necessary to insert a metal plate 6 inches long, ¼ inch thick and ⅝ inch wide, and a metal bolt 6/16 x 3 inches was screwed into his hip joint with four screws about 2 inches long, while the fractured clavicle was reduced by means of an open reduction and held in position with a figure eight stainless steel wire bolted to the base. (123) Said injuries are permanent. (129)

When defendant was examining his second witness the Court struck from plaintiff's complaint any allegation of negligence which alleges that the premises were not free of waste material and rubbish. (153)

Said school board member was unable to be in court during the time plaintiff's evidence was given (58), which was concluded just before closing time the second day of trial, and plaintiff rested. Said board member was available immediately when court opened the following morning. The Court did not permit him to testify. (143)

At the time of his injuries and for a long period prior thereto, plaintiff's annual earnings were approximately $20,000.

By reason of the matters and things hereinbefore alleged, plaintiff has been damaged in the sum of $100,000 on acount of pain, suffering and injuries that he has suffered and will continue to suffer, and a loss of earnings from his profession in the sum of $18,000 annually. (83)

WHEREFORE, plaintiff prays judgment against said defendant for the sum of $323,500 and for costs and disbursments herein sustained.

ARGUMENT No. 1

Defendant was negligent and careless in failing to keep the premises free from accumulations of waste

material and rubbish, particularly in and about the base of said ladder, during the process of the work.

Plaintiff rested and while defendant was examining their second witness, like a clap out of the clear, the Court halted proceedings and struck from the complaint the allegations regarding rubbish and waste material lying about the building and around the ladder. (153) After hearing various witnesses testify, it is not at all understandable why the Court would have stricken this allegation from the complaint.

The Court heard plaintiff testify:

"Will you pull me off this pile of rubbish?" (58)

"The ground, as I previously stated, had been filled up to a certain height from material from the excavation. On top of that it made a sort of little hill or a raised portion at the point where the ladder stood. Back of the ladder, particularly along there, was piled some rubbish, some broken boards, and some broken concrete blocks and also some cuttings, and some of those boards were also in front of the ladder, so that when you were ready to climb up the ladder you had to step on some of the boards. And I will have to state here that I don't believe that at any time I saw the exact position of the two standards of the ladder. The ground in there was so filled up with short pieces of lumber and rubbish that I don't think at any time that I saw the two standards of the ladder on any particular part of the ground there. That pile was just rubbish and was intended to be hauled away." (87)

"I cannot answer that its was solidly on the ground. As I said on my direct examination the ground was covered with rubbish and some material there and it was hard to see it (the ladder)." (95)

"I fell on a pile of rubbish." (115)

The Court heard defense witness Van Slike testify as follows: (150-151)

"Q. I will ask this: Did you notice any rubbish or broken concrete blocks about the bottom of this ladder, on the day in question?

A. The usual amount of junk lay around. (150)

Q. Do you recall whether this waste material had been there for any considerable period of time, or all during the construction, or was it just that day, or what?

A. I believe that they had cleaned up the mess that the bricklayers had made.

Q. Had this particular rubbish been there very long, to your recollection?

A. Not to my recollection." (151)

Henry George, a Spokane contractor, who has been in the construction business forty years, just finished the Spokane Coliseum and has built over one hundred million dollars worth of buildings, was called as plaintiff's expert witness.

The Court heard him testify:

> "Rubbish, broken tile, etc., are not allowed to accumulate around the base of ladder and around the building." (71)

The Court heard testimony of plaintiff's expert witness, R. C. Wurst, another building contractor: (75)

> "We keep the rubbish away from the building and normally piled up away from the building and we normally haul it off when it accumulates in a truck load."

These broken concrete blocks had been in and about the base of the ladder a considerable length of time or had been hauled there the forenoon in question, to-wit: September 12, 1952. The building was far past the place of using concrete blocks. The building was 50% completed—roof planking was on, the walls were up, interior partitions going in. (31) The contractors were working on the roof. (145)

How else but falling on broken concrete blocks could plaintiff Pehrson have sustained such severe injuries.

ARGUMENT No. 2

The defendant was negligent and careless in failing to furnish plaintiff a ladder to safely reach the roof of the building where immediate inspection was imperative on the morning of September 12, 1952,

the date of the accident. The overall height of the building was 19 feet on that date (15′4″ from the ground to a concrete ledge over the entrance of the building and 3′8″ from the ledge to the top of a concrete parapet wall). (36) In other words, the defendant, through his disregard for the safety of those who must go on the roof, compelled them to get over a 19 foot concrete wall with a 16 foot ladder. To get to the 15′4″ concrete ledge with a 16 foot ladder was dangerous because it must stand too straight. A ladder, to be safe, should be off one-fourth of its height from the perpendicular. (109) Therefore, to get safely over a 19 foot wall, the ladder should be approximately 20 feet long. True, by crawling over, climbing over or jumping over the 3′8″ wall, one ordinarily would succeed in reaching the roof. The ground about the base of the ladder was so covered with rubbish and broken concrete blocks it was difficult to see the base of the ladder or adjust it. (95) (87)

The Court erred in refusing to give Instructions Nos. 2 and 3 wherein it was stated that defendant should furnish adequate facilities for the plaintiff to make proper inspections of the building. The ladder was not fastened to the wall in any way.

The aforesaid Henry George, an expert witness for plaintiff, testified that ladders should be tied at the top and bottom, (71) and long enough to be safe to go to the point you want to get to. (71)

R. C. Wurst, expert witness for the plaintiff, testified ladders should be sufficient to reach the top of the building without difficulty, or where you intend to go on the building. (75)

ARGUMENT No. 3

The ladder was not fastened to the wall or ledge in any way. (52) The Court refused to admit plaintiff's Exhibit No. 11.

> "Mr. Towles: Your Honor (30) I am going to offer in evidence Plaintiff's Exhibit Number Eleven, which is the Idaho Minimum Safety Standard and Practices for the Building and Construction Industry—Code #2, Adopted September 15, 1947, by the Industrial Accident Board of the State of Idaho. In connection with these safety regulations, they were adopted by the Board pursuant to Sec. 72-1101 of the Idaho Code which authorized the Board to adopt reasonable, minimum safety standards, to make inspections in and about any place where workmen are employed. We have had these regulations certified by the Secretary of the Industrial Accident Board and the authority in connection with these safety standards is ——" (53)

> "The Court: Just offer it, Mr. Towles, and see if there is any objection. I am wondering if there is any more reason to put this in evidence than there would be to put the statutes or code of the state in. Isn't it a question of law that the Court takes judicial notice of in instructing the jury? It is just a little unusual to introduce the law in evidence, usually the court takes care of the law. However, if there is no objection, I will admit it, of course."

"Judge Hawkins: I do have objection to this. However, I didn't want to rise and tell Mr. Towles until he had finished. (31)

"The Court: What is your objection, Judge Hawkins?

"Judge Hawkins: I have a number of reasons to object to this, your Honor, first, it is a promulgation of rules and regulations put out by the Industrial Accident Board regulating the conditions of employment between an employer and an employee, a situation which is remote entirely from the obligations that this defendant, the construction company, may have had to an independent architect who was going on the property in behalf of the school district and who was not an employee of the defendant, and upon which he is attempting to impose conditions which are recited by the Industrial Accident Board in an employer-employee relationship. Our position is that the common law applies to this case but not regulations that are adopted by the Industrial Accident Board, the statute is quite clear on that. It is the working conditions that are here prescribed.

That is the fundamental objection to it. This man is an independent architect who has come in here and he does not hold any employer- employee relation. Likewise, if you are going to rely on official reports they have not complied with Section 9-317 that they plead the report or make it available in advance—it comes as a complete surprise, it has never been (32) pleaded in the pleadings and we have never had a chance to answer or allege the position of the defendant. If any reliance is had on a report of this kind it must be pleaded and made available and a copy

supplied to the adverse party a reasonable time before the trial and that has not been done in this instance, but the principal thing is that the purpose of these regulations is to protect the employer-employee relationship and not one in the position Mr. Pehrson finds himself, going in as a licensee to make an inspection of the premises under an independent contract."

"Mr. Towles: I think you are mistaken about his being a licensee, he was a business invitee on these premises. He was there because he had a right to be there."

"The Court: Don't you agree with me, Mr. Towles, that this is a question of law for the court to determine in giving his instructions to the jury under the evidence here? Is there any more reason to introduce that book than there would be to introduce the statutes that authorize it?"

"Mr. Towles: I think so, because your Honor has to know what is in this."

"The Court: But I am supposed to know that, Mr. Towles. (33)"

"Mr. Towles: If your Honor can take judicial notice of this——"

"The Court: ——I have always taken judicial notice of the laws of the State of Idaho or any document which is a part or authorized under the laws of the State of Idaho, I have always taken judicial notice of that and I have always taken care of it in my instructions to the jury. Perhaps this was not covered by the objection

made but it seems to me — I have no doubt but what this matter has no more purpose here in this record than if you introduced the sections of the statutes that authorized it."

"Mr. Towles: Then I understand your Honor takes judicial notice of this sort of thing?"

"The Court: Yes, I do."

"Mr. Towles: And they become a part of the law."

"The Court: That is the way I understand it. Does counsel have any objection to that ruling of the court?"

"Judge Hawkins: I have this objection, that the book is promulgated for an entirely different purpose."

"The Court: I understand (34) that, but isn't that a matter for me to consider after the evidence is in and in preparing the instructions to this jury?"

"Judge Hawkins: Without the benefit of that pamphlet, that is true and of course, it wasn't in the pleadings either."

"Mr. Towles: It wasn't necessary to plead the law in the pleadings."

"The Court: In order to hurry this matter along, I will take it under advisement, but my present thought is that I will not admit this book, but if I do decide to allow it in evidence I will rule on that later."

"Mr. Towles: We have alleged in this complaint that ladder was not securely fastened and we have alleged other general grounds of negligence."

"The Court: I will look over the pleadings and I will rule on it later." (57)

The Court not only refused to admit plaintiff's Exhibit No. 11. It also refused to give Plaintiff's Requested Instructions Nos. 3, 4, 5 and 6, all hearing on said Exhibit No. 11.

We wish to emphasize Plaintiff's Requested Instruction No. 5:

"You are further instructed that said Code in Part I, entitled 'General Requirements' under the heading 'Disposal of Waste Material' in (232) Section 1.117 provides as follows:

"'All scrap lumber, waste material, and rubbish resulting from the building construction shall be collected and removed, stored in neat piles, and not left to accumulate.'

and in Part IV, entitled 'Ladders' under the heading 'Portable Ladders' in Section 4.66 provides as follows:

"'In the use of ladders from the ground, the lower end shall be placed on a solid footing to prevent it sinking into the earth.'

and in Section 4.67 provides as follows:

"'If top of ladder is in danger of slipping or tipping, it shall be securely tied or fastened.'

> "You are further instructed that under Part I, Sec. 1.2, the Code makes the use of the word 'shall' in its provisions mandatory, and Part I, Sec. 1.4, makes employers and employees jointly responsible for the observance of applicable codes and safety measures and for the posting of all necessary warnings and danger signs conspicuously located at all points of traffic and hazard for the protection of the public and workmen."

Courts have invariably held that every person violating a statute is a wrongdoer, negligent in the eyes of the law, and that any innocent person injured by such violation if it be the proximate cause of the injury, may, in a proper case, receive from employer or contractor appropriate damages. If anyone upon whom the statute imposes a duty violates that duty and violation results in an injury, he is liable.

DECISIONS

The general rule supporting our contention is stated in 65 C.J.S. §19, page 418. We quote:

> "The generally accepted view is that violation of a statutory duty constitutes negligence, negligence as a matter of law, or negligence per se."

On page 420, §19, 65 C.J.S., we read:

> "The rule that violation of a statute is negligence per se has been applied with respect to statutes covering a large variety of subjects, among which may be mentioned building codes . . . ."

Further on page 420 we read:

> "Violation of a municipal ordinance designed for the protection of the person claiming to be injured by reason of such violation is usually considered as negligence per se or negligence as a matter of law."

We would not begin to quote from all the decisions mentioned in the various states named. The following, we believe, are sufficient to sustain our contention:

Idaho Code, Sec. 72-1101.

Pursuant to said statutory authority said Board adopted in 1947 Code 2, Idaho Minimum Safety Standards and Practices for the Building and Construction Industries which is still in effect.

Said Building Code acquired the force of law and became an integral part of the Workmen's Compensation Law of the State of Idaho.

Carron v. Guido, 54 Idaho, 494; 33 P. (2d) 345 at 347. In this case a young boy was shot. The seller of the ammunition made the sale in violation of state statute and was joined. The Court said:

> "The violation of a law intended for the protection of a person *and others like situated,* which results in his injury and is the proximate cause of it ,is negligence per se." (emphasis added)

This language indicates at least that even if Pehrson was not in the class directly protected, he was at least "like situated" as an employee of the School Board.

Pittman v. Sather, 68 Idaho, 494, 188 P. (2d) 600 at 606.

In this case a road contractor left a pile of rock on an unfinished highway. It was not lighted nor were there any barricades. The Court said:

> "Negligence per se is the violation of a statutory duty, or is such negligence as appears so opposed to the dictates of common prudence that a Court can say as a matter of law, without hesitation or doubt, that no careful prudent person would have committed."

Brixey v. Craig, 49 Idaho, 319, 288 P. 152, 154 involved a violation of the automobile code. The Court said:

> "The Court has frequently held that for one to violate a positive statutory inhibition is negligence per se, and not merely prima facie evidence of negligence. We do not question that rule."

Smith v. Oregon Short Line R. Co., 32 Idaho, 695 187 P. 539.

In this case there was an accident at a railroad crossing. There was evidence that the train did not ring a bell contrary to the provisions of an Idaho statute. The Court said:

> "The failure to conform to that statute has been held repeatedly to be negligence per se."

See also *Curoe v. Spokane and I.E.R. Co.,* 32 Idaho, 643, 186 P. 1101

Frazier v. Northern Pacific Ry. Co., 28 F. Supp. 20, 23 (1939).

A train was traveling at a rate of speed in excess of a municipality ordinance. A boy was hit and killed.

The Court held:

> "Of course an ordinance is as much a law within the limits of a municipality as a state statute, and is intended to protect persons and a violation thereof which results in injury and is the proximate cause of it is negligence per se as recognized by the Supreme Court of Idaho."

Lilly v. Grand Trunk Western R. Co., 317 U.S. 481, 87 L. Ed. 411, 417, 63 Sup. Ct. 347, where it was held that a rule adopted by the Interstate Commerce Commission in the exercise of the Commission's authority in fixing the standards of safety required under the Boiler Inspection Act, acquires the force of law and becomes an integral part of the Act, to be judicially noticed.

In the case of *Osborne v. Salvation Army,* 107 F. (2d) 929. Augustus Hand said:

> "In respect to the first defense, there is much reason for saying that a man who was given board and lodging upon the understanding that he

would do work about the building, which might be assigned to him, was 'working for another for hire' and hence when he performed services for the defendant became an employee, as defined by Section 2(5) of the Labor Law. But the statute would seem to apply even if he was not 'working for hire.'

"In spite of the fact that the Labor Act in general deals with matters arising out of the relation of master and servant, Section 202, in terms embraces all window cleaners, whether employees of the 'owner, lessee, agent, manager or superintendent' in charge of a building or not and has not been construed by the courts as limited to employees of the person charged with liability but has been treated as covering any person cleaning windows of a public building from the outside.

"Moreover, it seems quite unlikely that a laborer, even if not technically hired to clean windows, should not have the protection of safety devices, when we consider the purposes and broad language of the statute. We think that the plaintiff was within the class for whose protection Section 202 of the Labor Law was enacted and was entitled to a verdict in his favor unless the defendant had a defense of assumption of risk or contributory negligence. The better reasoned decisions have held that assumption of risk and contributory negligence, which the trial judge allowed to go to the jury, are not valid defenses in cases where the violation of a statute enacted for the benefit of a class of which the plaintiff is a member is involved. If the plaintiff's injuries arose from the violation, defendant's liability was absolute irrespective of any proof of negligence."

See U. S. Supreme Court case in *Brady v. Terminal Ry. Assoc.,* 303 U.S. 10; 82 L. Ed. 614 (1938). Plaintiff was employed by the Wabash Railroad to which Terminal was delivering a car. His duty was to inspect the car by the Wabash. He sued under the Safety Appliance Act which, of course, is for the purpose of protecting employers. The Court held at 14-15, 618:

> "In the instant case, petitioner in the course of his duty would have occasion to go upon the car and use the grabiron, and accordingly the benefit of the statute would extend to him, although he was not employed by the carrier holding the car in use, unless he was outside the scope of the statute because of the special character of his work. His work was that of inspection to discover defects of the sort here found to exist as well as others."

Under similar circumstances the Sixth Circuit said in *Fort Street Union Depot Co. v. Hillen,* 119 F. (2d) 307 at 312:

> "The fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended to be named as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command. (cites) The Act is remedial and humanitarian in purpose and calls for appropriate liberal construction."

Pacific States Lumber Co. v. Barger (9th Cir. 1926), 10 F. (2d) 335. It is cited in *McKay v. Pacific Bldg. Materials Co.* (S. Ct. Ore. 1937), 68 P. (2d) 127.

In the *McKay* case the defendant was not an employee of either defendant construction company but was employed on the premises. The Court said at 133:

> "Defendants urge that the provisions of the Employees Liability Act are not applicable to this case, because plaintiff was not an employee of defendants or either of them. In an opinion by Judge McCamant, a former member of this Court, the United States Circuit Court of Appeals for the Ninth Circuit say (sic) :Every employer whose work involves work or danger is required by the statute to take the required precautions, not only for the protection of his own employees, but also for the protection of employees of others whose duties bring them within reach of the dangers and risks of such work. The Supreme Court of Oregon has so construed the Statute, and this construction is binding on the federal court. (citations) Pacific States Lumber Co. v. Barger, 10 F. (2d) 335, 336."

See also *Coomer v. Supple Inv. Co.* (S. Ct. Ore. (1929), 274 P. 302. Here the plaintiff was an employee of a supplier to the defendant construction company.

There is a New York case involving a ladder, and, curiously enough, a school. This is *Koenig v. Patrick Const. Corp.* (Ct. App. N.Y. 1948), 83 NE (2d) 133. Plaintiff was an independent contractor hired to wash

windows of a school defendant was building. He fell from a ladder. At 133 "Plaintiff, seriously injured, commenced this suit for damages predicated primarily upon defendant's asserted failure to comply with the requirements of Section 240 of the Labor Law."

At 134:

> "Irrespective of how the courts may once have viewed the question (citations), it is our judgment that both sound reason and persuasive decisions, involving statutes whose content and purpose are similar to those of Section 240, require the conclusion that the statute does not permit the worker's contributing negligence to be asserted as a defense."

Defendant's superintendent, Mr. Lyle Richardson, was permitted to testify that he had never had any conversation at any time with any person concerning the condition of the ladder. (164) The following took place on the rebuttal:

By Mr. Therrett Towles:

> "Q. Mr. Pehrson, did you have a conversation with Mr. Richardson, the Superintendent at that building, with reference to the situation as to where this ladder was located?
>
> A. Yes.
>
> Q. How long before the accident was this?
>
> A. I would say about a week previous.
>
> Q. What did you say to Mr. Richardson?

Judge Hawkins: Now I object to this. This certainly is a part of their case in chief. He had this conversation and it was known at the time they were putting on their case in chief and we will object to it as not proper rebuttal. We could go back over all of the evidence if this is allowed.
The Court: The obpection is sustained." (216)

We feel the Court erred in sustaining defendant's objection.

The ground on which the ladder rested was a rough, uneven excavation and, therefore, the ladder could not sit on anything but rough, loose soil and rubbish, which plaintiff had to jump or climb over to get to the ladder. Because the defendant failed to furnish plaintiff proper facilities to do this work, plaintiff is a victim of the carelessness of said contractor and is a cripple for life due to said negligence.

ARGUMENT No. 4

The Court erred in refusing to permit School Director Donald Hirst to testify. As our supporting affidavits for a new trial stated, said Hirst was advised the case would not go to trial in the October 1954 term. Said case did not appear on the October docket. Said Hirst was ready to testify the following morning, after plaintiff rested. Defense had not made their opening statement.

"Material testimony ought not to be rejected because offered after the evidence is closed on

both sides, unless it is kept back by trick and the opposite party would be deceived or injuriously affected by it."

Wigmore, Vol. 4, page 10, §1867.

Did movant use reasonable diligence to procure the attendance of the witness?

39 Am. Jur. §37, page 57;

66 C.J.S. §96b, page 278;

46 C.J. §195(2), page 234.

We respectfully submit that it has been definitely established that the architect, plaintiff herein, was under a contract with the owner and was compelled to be on the Project to perform his duties, and we believe from the cases cited that he should be entitled to the benefit of the Idaho statutes and regulations as set forth in the complaint.

Respectfully submitted,

FRANK FUNKHOUSER
JAMES G. TOWLES
Attorneys for Appellant.